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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 694

HERBERT CLAY,

Petitioner,

—v.—

COMMONWEALTH OF KENTUCKY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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HERBERT CLAY,

Petitioner,

—v.—

COMMONWEALTH OF KENTUCKY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Petitioner prays that a writ of certiorari issue to review the judgment herein of the Court of Appeals of Kentucky entered in the above entitled case on June 16, 1970.

Citation to Opinion Below

The opinion of the Court of Appeals of Kentucky is reported at 454 S.W.2d 109, and printed in the Appendix, *infra*, pp. 21-23. It affirmed the judgment of the Harlan Circuit Court, which is printed in the Appendix, *infra*, pp. 19-20.

Jurisdiction

The judgment of the Court of Appeals of Kentucky was entered on June 16, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

Statute Involved

KENTUCKY RULES OF CRIMINAL PROCEDURE, RULE 11.42

11.42 Motion to vacate, set aside or correct sentence.

(1) A prisoner in custody under sentence who claims a right to be released on the ground that the sentence is subject to collateral attack may at any time proceed directly by motion in the court which imposed the sentence to vacate, set aside or correct it.

(2) The motion shall be signed or verified by the movant and shall state specifically the grounds on which the sentence is being challenged and the facts on which the movant relies in support of such grounds. Failure to comply with this section shall warrant a summary dismissal of the motion.

(3) The motion shall state all grounds for holding the sentence invalid of which the movant has knowledge. Final disposition of the motion shall conclude all issues that could reasonably have been presented in the same proceeding.

(4) The clerk of the court shall notify the Attorney General and the Commonwealth's Attorney in writing that such motion (whether it be styled a motion, petition or otherwise) has been filed, and the Commonwealth shall have 20 days after the date of mailing of notice by the Clerk to the Attorney General in which to serve an answer on the movant.

(5) Affirmative allegations contained in the answer shall be treated as controverted or avoided of record. If the answer raises a material issue of fact that can-

not be determined on the face of the record the court shall grant a prompt hearing and, if the movant is without counsel of record and is financially unable to employ counsel, shall appoint counsel to represent him in the proceeding, including appeal.

(6) At the conclusion of the hearing or hearings the court shall make findings determinative of the material issues of fact and enter a final order accordingly. If it appears that the movant is entitled to relief, the court shall vacate the judgment and discharge, resentence, or grant him a new trial, or correct the sentence as may be appropriate.

(7) Either the movant or the Commonwealth may appeal to the Court of Appeals, as a matter of right if the controversy involves a sentence of confinement for twelve months or more, and on motion otherwise.

(8) The final order of the trial court on the motion shall not be effective until expiration of time for notice of appeal under RCr 12.54 and shall remain suspended until final disposition of an appeal duly taken and perfected.

(9) Counsel appointed for the movant under this Rule shall be entitled to reimbursement by the Commonwealth for his reasonable expenses of travel and subsistence for necessary conferences with the movant at his place of confinement, provided that each trip made for that purpose be authorized in advance thereof by order of the trial court.

(10) Original applications for relief of the nature described in this Rule that are addressed directly to the Court of Appeals shall be referred to the Chief

Justice, who may cause same to be transmitted to the court in which the sentence was imposed for further disposition in the manner above set forth. (Am. Eff. 1-1-65)

Questions Presented

1. Does the Fourteenth Amendment require the states to afford state prisoners a corrective post-conviction process for the hearing and determination of all claims of violation of federal constitutional rights?

2. Does a decision of the highest court of a state refusing to set aside a conviction challenged in a post-conviction proceeding as having been obtained in violation of due process of law, because the prisoner had failed to appeal from his conviction, rest on adequate state grounds so as to preclude this Court from considering the substantive constitutional question.

3. In a homicide prosecution, is it a violation of due process of law for the prosecution and the police to fail to disclose the results of a scientific test which would support the contention of the accused that the killing was accidental and refute the contention of the state that the killing was wilful.

Statement of the Case

On March 28, 1968, the petitioner was brought to trial before the Circuit Court of Harlan County, Kentucky on a charge of wilful murder, allegedly committed on September 23, 1967. The principal witness for the prosecution testified that the petitioner committed the offense by pull-

ing the deceased out of the petitioner's automobile, shoving the deceased against a co-defendant, and then shooting him (Tr. pp. 3-5; App. *infra*, pp. 25-26).* The petitioner testified that he was attempting to remove the deceased from the front seat of the automobile, when the deceased seized a .45 caliber automatic pistol from the petitioner's belt, precipitating a struggle during which the pistol was accidentally discharged (Tr. pp. 27-29; App. *infra*, pp. 26-29).

On September 24, 1967, an investigation into the alleged homicide was undertaken by the Kentucky State Police, at which time samples of cotton fiber with red stains were removed from the front seat of the petitioner's automobile (Tr. pp. 37-38; App. *infra*, pp. 30-31). The samples were analyzed by the Kentucky State Police Laboratory, in Frankfort, Kentucky and by the Federal Bureau of Investigation in Washington, D.C. A report of the test results was sent by the Bureau to the Kentucky State Police Laboratory, which in turn sent it to Kentucky State Police Post 10, Harlan, Kentucky. The report and a package containing the samples from the seat of the petitioner's automobile were made a part of the "Hatmaker homicide investigation" file maintained by Post 10 (Tr. pp. 38-40; App. *infra*, pp. 30-32). The file was made available to the prosecuting attorney (Court of Appeals Opinion, App. *infra*, p. 22). At no time did the Kentucky State Police or the prosecuting attorney offer to permit the petitioner or his court-appointed counsel to inspect the file or even advise them of its existence.

The report disclosed that blood of the same type as that of the deceased had been found on the front seat of the

* References are to the transcript of testimony and proceedings which is contained in the Record filed with Clerk of the Court, and which is printed in excerpt in the Appendix, *infra*, pp. 25-33.

petitioner's automobile (Tr. p. 40; App. [illegible] pp. 32-33). The results of the scientific test as contained in the report, therefore, would have corroborated the contention of the petitioner that the deceased was killed in petitioner's automobile due to the accidental discharge of petitioner's pistol when it was seized by the deceased, and would have contradicted the testimony of the prosecution's principal witness to the effect that the petitioner dragged the deceased outside of the automobile and there killed him. The results of this test were not introduced into evidence by the prosecution at the trial, and as stated previously, neither the petitioner nor his court-appointed counsel was ever advised that such a test had been conducted.

At the trial, after the prosecution had completed the presentation of its case and after the petitioner had testified, petitioner's counsel learned about the test for the first time (Court of Appeals Opinion, App. [illegible] p. 22). He then called as witnesses the Commander of the Kentucky State Police Post and the trooper who was in charge of the investigation. After establishing the circumstances in which the test was made, he asked the trooper to state what the report of the test disclosed. The prosecution objected to the introduction of this evidence, and the objection was sustained by the Court on the ground that a proper foundation had not been laid (Tr. p. 40). The report was read into the record by avowal (Tr. p. 40), but the jury was never informed of the results of the test.

The petitioner was convicted of murder and sentenced to life imprisonment. No appeal was taken from the conviction. A post-conviction proceeding was instituted on petitioner's behalf pursuant to the provisions of Kentucky Rules of Criminal Procedure, Rule 11.42. The judge of the

Harlan Circuit Court, without holding a hearing, overruled the motion on the grounds that the evidence had properly been excluded and that the petitioner had been derelict in not having attempted to obtain such evidence prior to trial (Circuit Court Opinion, App. *infra*, p. 19). The Court of Appeals affirmed on the ground that, "Conceding arguendo that it may be a failure of due process sufficient to void a conviction if the prosecution conceals evidence material to guilt or innocence which is favorable to an accused," the issue could only be raised by direct appeal and not by a post-conviction motion under Rule 11.42 (Court of Appeals Opinion, App. *infra*, pp. 22-23).*

REASONS FOR GRANTING THE WRIT

I.

This Court should grant certiorari to determine the substantial federal question, raised but left unanswered by its decisions in *Case* v. *Nebraska*, and *Smith* v. *Illinois*, whether the Fourteenth Amendment requires the states to afford state prisoners a corrective post-conviction process for the hearing and determination of all claims of violation of federal constitutional rights.

Rule 11.42 of the Kentucky Rules of Criminal Procedure contemplates a post-conviction review process, but it is grossly inadequate because of the arbitrarily restrictive

* There was no finding by either the Court of Appeals or the Circuit Court that the petitioner, who was indigent and represented by court-appointed counsel, was advised of his right to appeal and to have court-appointed counsel on appeal and that, notwithstanding such advice, he deliberately made a decision not to appeal.

interpretation that the Kentucky Court of Appeals has put upon the issues that may be raised. As interpreted by the Kentucky Court of Appeals, Rule 11.42 is theoretically available for a consideration of those constitutional violations "which may have had a bearing on the legality or the fundamental fairness of the trial." *Dupin* v. *Commonwealth*, 404 S.W.2d 280 (Ky. Ct. App. 1966). That the suppression of evidence favorable to the defense constitutes a violation of due process speaking the fundamental fairness of a trial is beyond question. See *Giles* v. *State of Maryland*, 386 U.S. 66 (1967); *Brady* v. *State of Maryland*, 373 U.S. 83 (1963). The Kentucky Court, in refusing to consider petitioner's claims, has thus made it very clear that no post-conviction remedy is available to redress critical federal constitutional rights, unless those rights fit within arbitrary and somewhat mysterious parameters.*

In view of the exhaustion requirements of the federal habeas corpus remedy, 28 U.S.C. §2254, the provision of a truncated post-conviction remedy like that in Kentucky is worse than none at all. In the case at bar, for example,

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* The post-conviction remedy of Rule 11.42 has been held to be available to challenge the violation of the right to the appointment and effective assistance of counsel: *Hammershoy* v. *Commonwealth*, 398 S.W.2d 883 (Ky. Ct. App. 1966); *McCarthy* v. *Commonwealth*, 432 S.W.2d 50 (Ky. Ct. App. 1968). It has also been held to be available to challenge a coerced plea of guilty, *Lewis* v. *Commonwealth*, 411 S.W.2d 321 (Ky. Ct. App. 1967), and the denial of a fair trial because of prejudicial publicity. *Baldwin* v. *Commonwealth*, 406 S.W.2d 860 (Ky. Ct. App. 1966). However, it has been held to be unavailable to challenge the validity of a conviction obtained by use of illegally seized evidence. *Collier* v. *Commonwealth*, 387 S.W.2d 858 (Ky. Ct. App. 1965); *Wahl* v. *Commonwealth*, Ky., 396 S.W.2d 774 (1965). *Dupin* v. *Commonwealth*, 404 S.W.2d 280 (Ky. Ct. App. 1966); cf. *Kaufman* v. *United States*, 394 U.S. 217 (1969); *Mancusi* v. *DeForte*, 392 U.S. 364 (1968). And in case at bar it was held not to be available to challenge the suppression of evidence by the prosecution and the police.

petitioner has spent a year exhausting a remedy which has proven to be non-existent.

This Court has never squarely decided the question whether the Fourteenth Amendment requires that the states afford state prisoners a corrective post-conviction process for the hearing and determination of all claims of violation of federal constitutional rights. Certiorari was granted to decide this question in *Case* v. *Nebraska,* 381 U.S. 336 (1965), but the judgment of the state court was vacated and the case remanded, since in the interim the legislature had enacted a statute providing for a post-conviction procedure. The question was also raised in *Smith* v. *Bennett,* 365 U.S. 708 (1961), but was not necessary to the decision of the case. 365 U.S. at 713.

Nonetheless, the Court has strongly intimated that such a requirement exists. In *Young* v. *Ragen,* 337 U.S. 235 (1949), the Court, while remanding the case for consideration of the question of the availability of habeas corpus relief stated:

> "Unless *habeas corpus* is available, therefore, we are led to believe that Illinois offers no post-trial remedy in cases of this kind. The doctrine of exhaustion of state remedies, to which this Court has required the scrupulous adherence of all federal courts . . . presupposes that some adequate state remedy exists. We recognize the difficulties with which the Illinois Supreme Court is faced in adapting available state procedures to the requirement that prisoners be given some clearly defined method by which they may raise claims of denial of federal rights. *Nonetheless, that requirement must be met. If there is now no post-trial procedure by which federal rights may be vindicated*

in Illinois, we wish to be advised of that fact upon remand of this case." 337 U.S. at 238-239 (emphasis added).

In *Mooney* v. *Holohan*, 294 U.S. 103, 113 (1935), the Court, in finding that habeas corpus was available in California to raise the question of knowing use of perjured testimony, observed:

> "No decision of the Supreme Court of California has been brought to our attention holding that the state court is without power to issue this historic remedial process when it appears that one is deprived of his liberty without due process of law in violation of the Constitution of the United States. . . . In view of the dominant requirement of the Fourteenth Amendment, we are not at liberty to assume that the State has denied to its court jurisdiction to redress the prohibited wrong upon a proper showing and in an appropriate proceeding for that purpose." 294 U.S. at 213.

In *Taylor* v. *Alabama*, 335 U.S. 252, 272 (1948), Mr. Justice Frankfurter, after pointing out that the petitioner's conviction had already been affirmed on appeal, went on to say:

> "The Due Process Clause of the Fourteenth Amendment does require still further protection. A state must furnish corrective process to enable a convicted person, even after such proceedings as I have outlined, to establish that in fact a sentence was procured under circumstances which offend 'the fundamental conceptions of justice which lie at the base of our civil and political institutions'." (concurring opinion). See also *Carter* v. *Illinois*, 329 U.S. 173, 175-6 (1946).

The case at bar, where the state has expressly held that the violation of federal constitutional rights may not be asserted in a post-conviction proceeding, thus presents the Court with the opportunity to confront a fundamental question of due process which has eluded resolution.

Resolution of the instant case can also have important implications for federal-state relations at the judicial level, and should be undertaken by this Court for this reason as well. As Mr. Justice Brennan has observed:

> "None can view with satisfaction the channelling of a large part of state criminal business to federal trial courts. If adequate state procedures, presently all too scarce, were generally adopted, much would be done to remove the irritant of participation by the federal district courts in state criminal procedure." *Case v. Nebraska,* 381 U.S. 336, 344-345 (1965) (concurring opinion).

To impose on the states the requirement that they provide an adequate post-conviction remedy by which violations of constitutional rights may be asserted will not hamper the administration of state criminal justice, and will promote federal-state comity by putting the primary responsibility for the fairness of criminal proceedings where it belongs—upon the state itself. See the discussion in *Henry* v. *Mississippi,* 379 U.S. 443, 453 (1965).

This Court should grant certiorari to determine whether the Fourteenth Amendment requires the states to afford state prisoners a corrective post-conviction process for the hearing and determination of all claims of violation of federal constitutional rights.

II.

This Court should grant certiorari to determine the important question, relating to its appellate jurisdiction over state criminal proceedings, whether a decision of a state court refusing to set aside a conviction challenged in a post-conviction proceeding as violative of due process of law, because the prisoner had failed to appeal from his conviction, rests on an adequate state ground so as to preclude this Court from considering the substantive constitutional question.

In *Fay* v. *Noia*, 372 U.S. 391, 429 (1963), this Court expressly left open the question whether it could review the decision of a state court in a post-conviction proceeding in which the claimed violation of constitutional rights was rejected on the ground that it could not be asserted in such a proceeding. In the present proceeding the issue is squarely raised as to whether the "procedural fault" of the petitioner in failing to appeal from his conviction furnishes an adequate and independent ground of state decision precluding this Court from considering the substantive constitutional question of suppression of evidence. If the Court is not going to require that the states provide a post-conviction procedure by which all claims of violation of federal constitutional rights may be raised, this question may be expected to arise with some frequency. Other states that provide a form of post-conviction proceeding may well hold, as has Kentucky, that various critical constitutional claims may not be raised in that proceeding. In the case at bar the facts are not in dispute, and there is no practical reason why this Court cannot review the consti-

tutional claim on the merits. Certiorari should be granted to determine whether the "adequate state ground" concept bars such review.

In *Henry* v. *Mississippi*, 379 U.S. 443 (1965), this Court considered the "adequate state ground" concept in relation to procedural faults in state criminal proceedings and concluded that:

> "... a litigant's procedural faults in state proceedings do not prevent vindication of federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights." 379 U.S. at 447-8.

It was on this basis that a state rule requiring objection after each question in a prolonged series was held not to be an adequate state ground barring direct review by this Court. *Douglas* v. *Alabama*, 380 U.S. 415 (1965). See also *Wright* v. *Georgia*, 373 U.S. 284 (1963). However, a state rule prohibiting the relitigation in a post-conviction proceeding of a question that was previously determined on appeal or in a prior post-conviction proceeding has been held to constitute an adequate state ground. *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); *Durley* v. *Mayo*, 351 U.S. 277 (1956). The dimensions of *Henry* v. *Mississippi*, *supra*, remain unsettled.

This Court has not yet considered the question whether the denial of relief in a post-conviction proceeding on the ground that the petitioner had failed to appeal from his

criminal conviction constitutes an adequate state ground. It is submitted that under the test of *Henry* v. *Mississippi*, *supra*, the enforcement of such a procedural forfeiture serves no legitimate state interest so as to bar vindication of federal constitutional rights in this Court. The failure to appeal, it should be pointed out, does not affect the conduct of the trial as would, for example, a failure to challenge illegally seized evidence at the trial, as in *Henry* v. *Mississippi*, *supra*. Nor does the failure to appeal relate to relitigation as in *Johnson* v. *New Jersey*, *supra*. All the failure to appeal means is that the issue is being raised in post-conviction proceedings rather than on appeal, and since the state has made available such a proceeding, it is difficult to see how the state is prejudiced if the issue is raised in that proceeding rather than on appeal. It may be that the state wishes the proceedings to be "final." But, as this Court has stated, "Conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary judicial review." *Fay* v. *Noia*, *supra* at 424. This should be as true for direct review by this Court as it is for collateral review in a habeas corpus proceeding.

The absence of a legitimate state interest in requiring the question of violation of constitutional rights to be raised on appeal is even more evident in Kentucky, since Kentucky permits *some* constitutional questions to be raised in post-conviction proceedings. The rule that certain constitutional claims cannot be raised in post-conviction proceedings—and the Kentucky Court of Appeals has not indicated the criteria for determining which constitutional claims can be raised and which cannot—is patently arbi-

trary and serves no legitimate state interest. Therefore, under the principles enunciated in *Henry* v. *Mississippi*, *supra*, it cannot constitute an adequate state ground barring appellate review by this Court.

III.

The facts of this case clearly establish a violation of due process of law, so flagrant as to require this Court to grant certiorari and order that the judgment of conviction be set aside.

The prosecution in the case at bar suppressed weighty scientific evidence which would have both discredited the testimony of the state's key witness and corroborated that of the petitioner. Suppression of exculpating evidence constitutes an unarguable denial of due process. *Giles* v. *State of Maryland*, 386 U.S. 66 (1967). *Brady* v. *State of Maryland*, 373 U.S. 83 (1963). Counsel for petitioner learned of the official tests made on petitioner's car only after the state's case had been concluded and the petitioner had testified. His last minute attempt to introduce the results of those tests was objected to by the prosecutor and barred by the Court. A more clearly prejudicial circumstance is hard to imagine.

The zeal with which the prosecution made its case was reflected in its closing argument to the jury:

> "I think one of the world's tragedies is for a man to go to Saipan in defense of his country, lose the muscles of his legs, lose most of his strength, and then come home and let a six-foot three, colored man jerk him out of an automobile, just back from a trip with

> Rev. Bowen, with a cocked .45 automatic under his belt and with a good reputation to kill a man under those circumstances." (Objection at this point overruled.)

"A criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The States pursuit is justice, not a victim." *Giles* v. *State of Maryland, supra,* 386 U.S. at 100 (concurring opinion of Mr. Justice Fortas). The deliberate suppression of evidence favorable to the defense grossly oversteps the bounds of prosecutorial propriety.

The lower court, in denying the motion for post-conviction relief, stated that, "Said evidence was available to the defendant on request to the Kentucky State Policemen and the defendant was derelict in failing to make an effort to obtain the evidence." (App. *infra,* p. 19.) But the violation of due process is not vitiated by the failure of a criminal defendant or his counsel to make a request for evidence the existence of which may not have been known to them. The duty was not on the petitioner or his counsel to discover the evidence. It was on the police and the prosecutor to disclose it. As Judge Sobeloff stated in response to this argument in *Barbee* v. *Warden, Maryland Penitentiary,* 331 F.2d 842, 845-6 (4th Cir., 1964):

> "It is no answer that Barbee's attorney failed to ask for the results of the test. While a diligent defense counsel may have learned about the police reports, this is too speculative a consideration to outweigh any unfairness that actually resulted at the trial. He may not have known that the tests were made. Indeed he may have been misled into thinking that the test, if

> made, supported the state's theory and was adverse to his client. . . . In gauging the nondisclosure in terms of due process, the focus must be on the essential fairness of the procedure and not on the astuteness of either counsel."

See also *Imbler v. Craven*, 298 F. Supp. 795 (C.D. Cal. 1969). The duty of disclosure has nothing to do with the "diligence" of the defendant or his counsel, but is put upon the prosecutor and the police as an essential ingredient of due process of law.

In the case at bar there has been a flagrant violation of due process of law, which has been sanctioned by the Kentucky Court of Appeals solely because the indigent defendant, the petitioner herein, failed to take an appeal from his criminal conviction. Certiorari should be granted to redress that violation.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be granted to review the judgment of the Court of Appeals of Kentucky.

Respectfully submitted.

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